

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ANTHONY J. BATTAGLIA, JUDGE PRESIDING

IN RE INCRETIN-BASED THERAPIES,) CASE NO. 13-MD-02452-AJB
PRODUCTS LIABILITY LITIGATION)
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) SAN DIEGO, CALIFORNIA
-----) SEPTEMBER 10, 2014
) 10:20 A.M.
THIS DOCUMENT RELATES TO ALL CASES)
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)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: CASE MANAGEMENT CONFERENCE

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1 **SAN DIEGO, CALIFORNIA; WEDNESDAY, SEPTEMBER 10, 2014; 10:20 AM**

2 **DEPUTY CLERK:** NUMBER ONE ON CALENDAR, CASE NUMBER
3 13MD2452, IN RE INCRETIN MIMETICS PRODUCTS LIABILITY
4 LITIGATION, ON FOR DISCOVERY CONFERENCE.

5 **THE COURT:** ALL RIGHT. GOOD MORNING OR AFTERNOON,
6 DEPENDING ON WHERE YOU ALL ARE. THIS IS JUDGE BATTAGLIA, THAT
7 IS GOING TO PRESIDING OVER THE HEARING TODAY.

8 WE DIDN'T, I DON'T THINK, GET A LIST OF ATTENDEES.
9 SO WHY DON'T WE, STARTING WITH THE PLAINTIFFS, HAVE YOU
10 IDENTIFY YOURSELVES SLOWLY, SPELLING THE LAST NAMES SO THE
11 REPORTER CAN COMPLETE THE RECORD. SO IN NO PARTICULAR ORDER,
12 SOMEBODY GO FIRST ON THE PLAINTIFFS' SIDE.

13 **MR. JOHNSON:** GOOD MORNING, YOUR HONOR. THIS IS MIKE
14 JOHNSON.

15 **THE COURT:** OKAY. AND WHO ELSE?

16 **MR. SHKOLNIK:** GOOD MORNING, YOUR HONOR. THIS IS
17 HUNTER SHKOLNIK.

18 **THE COURT:** OKAY. THANKS, MR. SHKOLNIK.
19 NEXT, IF ANYONE.

20 **MR. KENNERLY:** GOOD MORNING, YOUR HONOR. THIS IS MAX
21 KENNERLY, K-E-N-N-E-R-L-Y.

22 **THE COURT:** ALL RIGHT. THANKS.
23 NEXT.

24 **MR. THOMPSON:** RYAN THOMPSON FOR THE PLAINTIFF.

25 **MS. BLATT:** GAYLE BLATT --

1 **THE COURT:** I HAVE MR. THOMPSON DOWN. I THINK I
2 HEARD MS. BLATT, BUT CONFIRM THAT ONE WAY OR ANOTHER.

3 **MS. BLATT:** YES, YOUR HONOR. GAYLE BLATT.

4 **THE COURT:** THANK YOU. AND ANYBODY ELSE? IT LOOKS
5 LIKE NOT.

6 (PHONE CUTS OUT)

7 **THE COURT:** TRY THAT AGAIN.

8 **MR. HOERMAN:** GOOD MORNING, JUDGE. TOR HOERMAN FOR
9 THE PLAINTIFFS. HERE WITH ME IS CHAD FINLEY.

10 **THE COURT:** MR. HOERMAN AND THEN MR. FINLEY.

11 **MR. PLATTENBERGER:** GOOD MORNING, YOUR HONOR. JACOB
12 PLATTENBERGER FOR THE PLAINTIFFS.

13 **THE COURT:** GOT YOU. WHO ELSE?

14 **MR. JOHNSON:** I THINK THAT IS IT FOR PLAINTIFFS, YOUR
15 HONOR.

16 **THE COURT:** GREAT. LET'S GO TO THE DEFENSE SIDE OF
17 THE CALL AND GIVE US YOUR NAME AND THE PARTY YOU REPRESENT.

18 **MS. REYES:** GOOD MORNING, YOUR HONOR. THIS IS ANA
19 REYES FOR MERCK.

20 **THE COURT:** OKAY. THANK YOU.

21 **MR. KING:** GOOD MORNING, YOUR HONOR. KENNETH KING
22 FOR ELI LILLY AND COMPANY.

23 **THE COURT:** THANKS, MR. KING.

24 **MS. LEVINE:** YOUR HONOR, THIS IS HEIDI LEVINE AND
25 CHRISTOPHER YOUNG ON BEHALF OF NOVO NORDISK.

1 **THE COURT:** FOR NOVO MS. LEVINE AND CHRIS --

2 **MS. LEVINE:** YOUNG.

3 **THE COURT:** THANK YOU.

4 **MR. THOEN:** THIS IS ALLAN THOEN, T-H-O-E-N, FOR ELI
5 LILLY.

6 **THE COURT:** THANK YOU. ANYBODY ELSE?

7 **MS. LAURENDEAU:** GOOD MORNING, YOUR HONOR. AMY
8 LAURENDEAU, L-A-U-R-E-N-D-E-A-U, FOR AMYLIN PHARMACEUTICALS.

9 **THE COURT:** THANKS. ANYBODY ELSE? SOUNDS LIKE NOT.

10 SO THIS IS A DISCOVERY CONFERENCE ADDRESSING ISSUES,
11 ESSENTIALLY, IN THE FORM OF A MOTION TO COMPEL AGAINST
12 DEFENDANTS, WITH REGARD TO ANALYSES OF CAUSAL ASSOCIATION.
13 THAT IS HOW THE DOCUMENTS ARE ENTITLED.

14 IT RELATES SPECIFICALLY, AS I CAN TELL FROM REVIEWING
15 ALL THE PAPERWORK, TO INTERROGATORIES 25 AND 26, AND DOCUMENT
16 REQUESTS 43, 44, 45, 47, 50, 52, 57 AND 58.

17 ALL OF THESE DOCUMENT REQUESTS/INTERROGATORIES ARE
18 INTERRELATED WITH REGARD TO DISCOVERY REGARDING CAUSAL
19 CONNECTION BETWEEN THE DEFENDANTS PHARMACEUTICALS AND
20 PANCREATIC CANCER.

21 AND HAVING READ THE DOCUMENTS, I AM WELL-VERSED IN
22 WHERE YOU ARE AT THE MOMENT. BUT AS I PROMISED IN THE
23 DISCOVERY PROTOCOL, I WOULD ENTERTAIN THE PLAINTIFFS GIVING ME
24 SOMETHING IN THE WAY OF A REPLY, IF THERE IS ANYTHING THEY WANT
25 TO ADD. AND CERTAINLY THE DEFENSE CAN WEIGH IN ON THE NEW

1 MATTER IF IT'S ADDRESSED BY WAY OF REPLY.

2 AND WHEN YOU FOLKS SPEAK, TO THE EXTENT THAT YOU ARE
3 SHARING SOME OF THE DUTIES, MAKE SURE TO REIDENTIFY YOURSELF BY
4 NAME AND THEN COMMENT. SO WHO WANTS TO SPEAK FIRST ON BEHALF
5 OF THE PLAINTIFFS IN THE NATURE OF A REPLY OR FURTHER COMMENT?

6 **MR. KENNERLY:** YOUR HONOR, THIS IS MAX KENNERLY. I
7 WILL BE DOING THE BULK OF THE RESPONSE HERE.

8 **THE COURT:** OKAY. GO AHEAD.

9 **MR. KENNERLY:** THERE IS FIVE TOPICS I WANT TO COVER,
10 AND UNDERSTANDING THAT THE COURT DOES NOT WANT TO HEAR ANYTHING
11 REITERATED THAT IS IN THE BRIEF.

12 THE FIRST IS WHAT IT IS THAT WE WANT DEFENDANTS TO
13 DO. AND AS WE READ DEFENDANTS' RESPONSE, THERE IS A NUMBER OF
14 ARGUMENTS ABOUT HOW DEFENDANTS ARE NOT OBLIGATED TO GO THROUGH
15 THEIR OWN CUSTODIAL PRODUCTION TO FIND RELEVANT DOCUMENTS FOR
16 US.

17 WE AGREE WITH THAT. THAT'S NOT WHAT WE'RE ASKING
18 THEM TO DO. WE'RE NOT ASKING THEM TO DO AN INDEPENDENT SEARCH
19 OF THE NDA OR ANYTHING ELSE LIKE THAT. WHAT WE'RE ASKING THEM
20 TO DO IS TO GO BACK, SPEAK WITH KNOWLEDGEABLE EMPLOYEES,
21 PRESENT THEM WITH THE REQUESTS -- OR SOME, YOU KNOW,
22 LAWYER-STREAMLINED VERSION OF THE REQUESTS, ASK THEM WHAT
23 INFORMATION THEY KNOW, WHAT DOCUMENTS THEY HAVE, AND THEN
24 REPORT THAT BACK IN DISCOVERY. SO IN MANY WAYS IT'S KIND OF
25 TALKING BACK AND FORTH ON TWO SIDES.

1 MOVING TO THE SECOND ISSUE. THE DEFENDANTS' RESPONSE
2 SAYS THAT THIS IS NOT A MOTION ABOUT, QUOTE, MISSING DISCOVERY,
3 CLOSE QUOTE. AND THIS GOES BACK TO WHAT IT IS THAT WE'RE
4 ASKING THEM TO DO.

5 IT IS ABOUT MISSING DISCOVERY. MERCK, IN ITS
6 RESPONSE, TALKED ABOUT THE PRODUCT DEVELOPMENT TEAM, ABOUT THE
7 SAFETY REVIEW COMMITTEE, AND ABOUT THE RISK MANAGEMENT SAFETY
8 TEAM.

9 THE REFERENCE THEY GIVE -- THIS IS A SMALL STACK OF
10 DOCUMENTS; AT LEAST SMALL COMPARED TO THE OVERALL PICTURE.
11 IT'S ABOUT 21,000 PAGES, THE BATES RANGE THAT THEY HAVE THERE.
12 THIS WAS DUMPED ON US, BUT THEN THERE IS A REFERENCE IN THE
13 DISCOVERY RESPONSES TO THESE 21,000 PAGES OF BATES NUMBERS.

14 LOOKING THROUGH THAT, WE CAN'T FIND ANY RISK
15 MANAGEMENT SAFETY TEAM MINUTES ANYWHERE IN IT. AND THAT WOULD
16 BE YOUR PRIMARY FRONT LINE, WHERE YOUR ACTUAL SCIENTISTS AT
17 MERCK START LOOKING AT THE CAUSAL EVIDENCE HERE.

18 WHAT ARE THEY EVALUATING? WHAT ARE THEY DOING
19 CONCERNING THIS ISSUE? WHAT SCIENTIFIC EVIDENCE IS BEING
20 PRESENTED IN FRONT OF THEM?

21 AND THAT KIND OF RAISES A LOT OF QUESTIONS TO US
22 ABOUT WHERE DID THIS COME FROM. OUR BEST GUESS IS THAT THE
23 DOCUMENTS IN THOSE 21,000 PAGES ARE PULLED FROM SHAREPOINT, ONE
24 OF THEIR DOCUMENT SERVERS THAT KIND OF HAPHAZARDLY COLLECTS
25 DOCUMENTS ONE WAY OR THE OTHER.

1 BUT THE PROBLEM HERE IS NONE OF THAT HAS ANY RHYME OR
2 REASON TO IT. AND WE HAVE NO ASSURANCE THAT IT'S ACTUALLY ALL
3 OF THE DOCUMENTS. WE HAVE NO ASSURANCE THAT IT REFLECTS THE
4 KNOWLEDGE OF THE EMPLOYEES. AND WE DON'T KNOW IF IT'S BEEN
5 CHERRYPICKED, WHAT'S IN THERE.

6 AND THAT IS WHY THERE ARE THREE DIFFERENT GROUPS OF
7 DOCUMENTS THAT SHOULD BE IN A PRODUCTION LIKE THAT, THAT WE
8 CAN'T FIND. AND THEN WE THINK THAT THESE WOULD BE READILY
9 ACCESSIBLE. IF YOU SIMPLY PRESENTED THIS TO MANY OF THE SAFETY
10 PEOPLE IDENTIFIED AS CUSTODIANS -- AND ANYONE ELSE WITH
11 KNOWLEDGE OF IT -- YOU'D GET THESE THREE GROUPS OF DOCUMENTS.

12 AND THIS, AGAIN, IS NOT ANYTHING THE DEFENDANTS HAVE
13 HELPED US WITH. THIS IS WHAT, THROUGH OUR OWN COMBING BACK AND
14 FORTH, REALLY SHOULD JUMP OUT. AND THE FIRST IS THE RISK
15 MANAGEMENT SAFETY TEAM MINUTES, THE FACT THAT THERE ARE NO
16 MINUTES FROM THE DOCUMENT RANGE THERE. IT INDICATES TO US THAT
17 THEY'VE NEVER BEEN THERE.

18 THE SECOND ARE THE SIGNAL DETECTION REPORTS.

19 **THE COURT:** I'M SORRY. SAY THAT AGAIN? THE WHAT?

20 **MR. KENNERLY:** THE SIGNAL DETECTION REPORTS.

21 BASIC PHARMACOVIGILANCE, YOU LOOK FOR SAFETY SIGNALS
22 ROUTINELY. WE CAN'T FIND ANYTHING FROM BEFORE 2012 IN THAT
23 PILE OF DOCUMENTS, OR REALLY SEARCHING ACROSS EVERYTHING. THE
24 BIGGEST PICTURE ANALYSIS THAT GOES TO THE FDA IS THE POOLED
25 SAFETY ANALYSIS. AND FROM WHAT'S ALREADY BEEN IN FRONT OF THE

1 COURT IS THIS LAW REFERENCE TO HOW YOU HAVE TO DO A
2 COMPREHENSIVE VIEW OF SAFETY, YOU HAVE TO DO A POOL, YOU HAVE
3 TO DO AN AGGREGATE, ALL THOSE TYPES OF TERMS TO BRING
4 EVERYTHING TOGETHER.

5 WE HAVE THE POOLED SAFETY ANALYSIS THAT THEY PRESENT
6 TO THE FDA, BUT WE DON'T HAVE ANY OF THE STATISTICAL ANALYSIS
7 UNDERNEATH IT.

8 WE HAVE SUBSEQUENT CONCLUSIONS, BUT WHAT THE
9 EPIDEMIOLOGISTS THEMSELVES WOULD HAVE COME UP WITH, WHAT THEY
10 WOULD HAVE REVIEWED, ARE NOT THERE. THAT PRESENTS ITS OWN
11 PROBLEM OF OUR EXPERTS ARE HOBBLED BY IT, NOWHERE TO EVEN START
12 TO LOOK INTO HOW MERCK HAS DEALT WITH ANY OF THIS, TO LOOK AT
13 HOW ANY OF THIS DATA HAS BEEN USED AT THE COMPANY.

14 AND WE ALREADY SEE PROBLEMS IN IT. ONE OF THEM IS IN
15 THEIR STATISTICAL ANALYSIS, IT LOOKS LIKE THEY'VE POOLED
16 TOGETHER NEOPLASMS ACROSS ALL ORGANS, WHICH SCIENTIFICALLY WE
17 SEE NO REASON WHY YOU'D DO THAT. YOU LOOK AT WHERE YOU MIGHT
18 BE DEVELOPING NEOPLASMS IN A PARTICULAR ORGAN.

19 WE'VE ALSO SEEN -- IT LOOKS LIKE THE POOLED SAFETY
20 ANALYSIS WAS BASED ON ALL OF THE PANCREATIC CANCER EVENTS IN 25
21 OF THE CLINICAL TRIALS. THAT IS NOWHERE NEAR THE AMOUNT THAT
22 SHOULD BE IN THERE. I MEAN, IN THEORY YOU COULD PUT IT WITH
23 OVER A HUNDRED CLINICAL TRIALS, BUT AT LEAST 40 OR MORE OF
24 THOSE TRIALS HAVE SUFFICIENT DATA THAT IT SHOULD GO INTO A
25 POOLED SAFETY ANALYSIS.

1 AND AGAIN, IT'S NOT A MATTER THE DEFENDANTS NEED TO
2 EXPLAIN IN DETAIL OFF OF THIS. THEY WOULD HAVE THIS. IF YOU
3 ASKED AN EPIDEMIOLOGIST AT MERCK WHERE'S THE STATISTICAL REPORT
4 FOR THE POOLED SAFETY ANALYSIS, THEY'D PROBABLY BE ABLE TO PULL
5 IT RIGHT OFF THE SHELF. SO IT IS ABOUT MISSING DISCOVERY. WE
6 DON'T KNOW WHAT CAUSAL DOCUMENTS WE HAVE. IT LOOKS LIKE WE
7 HAVE A HAPHAZARD FILM FROM THEIR SHAREPOINT, BUT IT DOESN'T
8 MEAN THAT MERCK HAS EVER SAT DOWN, ASKED THE RELEVANT PEOPLE:
9 WHAT DO YOU KNOW ABOUT THE CAUSAL ANALYSIS IN GIVING US THE
10 MINUTES, THE SIGNAL DETECTION REPORTS, AND THE ANALYSES
11 UNDERLYING THE POOLED SAFETY ANALYSIS?

12 MOVING TO THE THIRD TOPIC, IN ITS RESPONSE, MERCK
13 REFERENCES -- I THINK ON PAGE FOUR -- THAT THEY GAVE A TARGET
14 RESPONSE ABOUT FDA INFORMATION. AND I SENT DEFENSE COUNSEL AN
15 E-MAIL RIGHT AFTER THEY FILED IT. AND THEY PROMPTLY GOT BACK
16 TO ME AND SAID THEY WERE TALKING ABOUT INTERROGATORY 34, WHICH
17 IS NOT PART OF THIS.

18 AND THAT KIND OF GIVES US A TEMPLATE AS REALLY WHAT
19 WE'RE LOOKING FOR. BECAUSE IN RESPONSE TO INTERROGATORY 34,
20 WHICH ASKS ABOUT COMMUNICATIONS WITH THE FDA RELATING TO THE
21 2014 ANALYSIS, MERCK'S RESPONSE WAS WE WENT, WE TALKED WITH OUR
22 CUSTODIAN, WE TALKED WITH LOU ANN EADER.

23 LOU ANN EADER WAS ABLE TO PROVIDE TO US AN E-MAIL THE
24 FDA SENT HER IN AUGUST, AND A RESPONSE THAT MERCK SENT BACK IN
25 NOVEMBER. THAT'S WHAT WE'RE ASKING FOR: LET'S JUST TALK TO

1 PEOPLE AND GET A RESPONSE BACK TO US.

2 BUT THAT KIND OF WEIGHS IN IN ITS OWN GLOBAL ISSUE AS
3 TO WHY THIS IS ALL SO IMPORTANT, THAT MERCK TALK TO ITS
4 EMPLOYEES AND GIVE US INFORMATION BACK. THAT IS VERY
5 PERTINENT, THAT COMMUNICATION BACK AND FORTH.

6 AND ON SPREADSHEETS THAT MERCK PROVIDES TO THE FDA,
7 TALKING ABOUT SOME OF THEIR CLINICAL TRIALS IN PANCREATIC
8 CANCER, VERY CRITICAL INFORMATION. THIS HAPPENS BACK IN AUGUST
9 AND NOVEMBER. MERCK DOES NOT IDENTIFY THIS COMMUNICATION WITH
10 THE FDA RIGHT IN THE SUBJECT OF THIS ENTIRE LITIGATION UNTIL
11 JUNE 30TH. THAT IS THE FIRST RESPONSE THAT EVER REFERENCES
12 ANYTHING BACK AND FORTH OF THIS.

13 SO WE FOUND THIS BECAUSE WE GET THE DOCUMENTS THAT
14 SHOWS THIS IN APRIL 2014. AND AGAIN, THERE IS A SIX-MONTH
15 DELAY FROM WHEN MERCK HAD THIS IN THEIR HAND, DIRECTLY RELEVANT
16 TO EVERYTHING, TO WHEN THEY PHYSICALLY PRODUCED IT TO US.

17 THEY DON'T PRODUCE IT TO US AND SAY LOOK AT THIS
18 DOCUMENT BACK AND FORTH TO THE FDA. THEY DUMP IT IN THE MIDDLE
19 OF AN ESI REQUEST GOING THROUGH THE IND AND THE NDA. AND FOR
20 WHATEVER REASON, IT'S ONLY IN THE NDA FOR JANUMET. IT'S NOT
21 EVEN IN THE JANUVIA NDA.

22 WE FOUND THIS ON OUR OWN, DOING THESE FISHING
23 SEARCHES ACROSS EVERYTHING. WHEN IF YOU JUST ASK LOU ANN
24 EADER: HAVE YOU BEEN TALKING WITH THE FDA ABOUT PANCREATIC
25 CANCER, SHE WOULD HAVE SAID THIS IMMEDIATELY.

1 AND SHE DID, WHENEVER IT WAS THAT MERCK TALKED TO
2 HER, BUT WE DON'T HEAR THIS UNTIL JUNE 30TH. SO THIS IS WHAT
3 WE WANT. WE'D LIKE IT A LITTLE BIT FASTER. WE'D LIKE IT A
4 LITTLE BIT MORE THOROUGH, BUT THEY JUST NEED TO TALK WITH THE
5 CUSTODIANS AND SEE WHAT THE CUSTODIANS TELL US, OR ANY OTHER
6 KNOWLEDGEABLE EMPLOYEE, AND RECORD IT TO US.

7 **THE COURT:** WOULD YOU TELL ME, IS IT LOU ANN EADER?
8 COULD YOU SPELL THAT?

9 **MR. KENNERLY:** EADER, E-A-D-E-R.

10 **THE COURT:** OKAY. GO AHEAD.

11 **MR. KENNERLY:** THE FOURTH ISSUE RELATES TO RAW DATA.
12 AT THIS ISN'T A MOTION ABOUT RAW DATA, BUT IT REFLECTS WHY WE
13 NEED SOME GUIDANCE FROM THE COURT ON HOW MUCH THE COMPANY NEEDS
14 TO TELL US.

15 THE PRIMARY DISCOVERY THEY HAVE GIVEN US ARE THESE
16 LARGE SPREADSHEETS THAT REFLECT CLINICAL TRIALS AND NONCLINICAL
17 TRIALS AND NONCLINICAL STUDIES THAT WERE DONE RELATING TO THESE
18 DRUGS. WE DON'T HAVE THE RAW DATA OFF OF THEM. WE WERE GIVEN
19 THE OPTION TO START REQUESTING THE RAW DATA. WE'VE BEEN
20 MEETING AND CONFERRING ON THAT FOR SOME TIME. AND, ACTUALLY,
21 WITH REGARD TO MERCK, WE ARE GOING TO HAVE A REQUEST FOR THEM
22 EITHER TODAY OR TOMORROW.

23 THE PROBLEM WITH THAT IS THAT'S ITS OWN VERY ARDUOUS
24 PROCESS. THE SPREADSHEETS DO NOT POINT US TO WHAT HAS
25 PANCREATIC CANCER DATA. THEY DO NOT POINT US TO WHERE THEY'VE

1 SEEN PANCREATIC CANCER EVENTS.

2 SO WE HAVE TO COMB THROUGH THESE AS BEST WE CAN. WE
3 HAVE TO DIG OUT THE PROTOCOLS, WE HAVE TO TALK WITH THEIR
4 EXPERTS, AND THEN GO BACK AND FORTH TO MERCK AND SAY, OKAY,
5 WELL MAYBE THERE IS RAW DATA IN THIS ONE, MAYBE THERE IS RAW
6 DATA IN THAT ONE.

7 IF WE HAD THESE SORTS OF ANALYSES THEY THEMSELVES
8 HAVE BEEN PERFORMING, THIS WOULD BE MUCH SIMPLER. AND WHAT
9 WE'RE GOING TO RUN INTO AT THESE DEPOSITIONS IS THE FIRST ROUND
10 OF THE DEPOSITION IS GOING TO BE A BASIC, WELL, WE HAVE TO FIND
11 THESE DOCUMENTS, DO YOU RECALL THE DOCUMENTS, DO YOU KNOW OF
12 ANY DOCUMENTS.

13 IT SHOULDN'T BE THAT WAY. WE SHOULD HAVE IT
14 STREAMLINED. THE CORPORATION SHOULD HAVE RESPONDED BEFORE AND
15 TOLD US THESE THINGS THAT IT KNOWS OF. NOT EVERY DOCUMENT, BUT
16 EVERY DOCUMENT IT KNOWS OF, THAT THEY NEED TO KNOW OF, AND THEN
17 WE CAN GET TO THE SUBSTANCE OF THIS CASE.

18 THE LAST ISSUE -- I DON'T KNOW IF THE COURT EVEN
19 WANTS TO GO INTO IT -- IS ABOUT WHAT OCCURS AT THE MEET AND
20 CONFERS.

21 **THE COURT:** NO, I DON'T. I DON'T WANT TO HEAR ABOUT
22 THE LAWYER-BASHING ARGUMENTS BACK AND FORTH. I MADE THAT
23 CLEAR. THIS IS SUPPOSED TO BE A SIMPLIFIED PROCEDURE AND,
24 FRANKLY, I'M GIVING A SERIOUS THOUGHT OF JUST SENDING YOU BACK
25 TO JUDGE DEMBIN AND LETTING HIM DEAL WITH THIS BECAUSE I ASKED

1 FOR A BRIEF SUMMARY THAT YOU DID MEET AND CONFER. WHAT I GET
2 IS FOUR PAGES OF WHAT EVERYBODY IS DOING TO EVERYBODY ELSE. I
3 REALLY WANT TO MOVE THIS CASE ALONG. AND I DON'T KNOW WHAT
4 DISTRICTS YOU ALL PRACTICE IN, BUT THIS IS THE SIXTH BUSIEST
5 DISTRICT IN THE UNITED STATES. IT IS HIGHLY UNUSUAL FOR A
6 DISTRICT JUDGE TO GET INVOLVED IN DISCOVERY, AND I'M STARTING
7 TO REGRET THAT I SAID I WOULD DO IT.

8 YOU GUYS NEED TO GET TO THE POINT AND GET MOVING OR
9 I'LL SEND YOU BACK TO JUDGE DEMBIN, AND HE CAN SPEND HIS TIME
10 WITH YOU. HE HAS MORE TIME THAN I DO, FRANKLY. SO DON'T GIVE
11 ME THE MISDEEDS OF COUNSEL. IT'S JUST NOT GOING TO GO
12 ANYWHERE. IT'S NOT FLATTERING TO ANY OF YOU TO KEEP GOING BACK
13 TO WELL, THEY'RE HIDING STUFF, THEY'RE BEING EVASIVE, AND
14 THEY'RE DELAYING IN THEIR APPROACH AND OBFUSCATING ALL OF THIS.

15 JUST GET OVER IT. LET'S GET DOWN TO WHAT IT IS YOU
16 WANT, WHY IT'S RELEVANT, AND THEN I WILL FASHION A RELIEF. IF
17 YOU WANT TO PLAY THE GAME OF LAWYER-BASHING, YOU CAN GO SEE
18 JUDGE DEMBIN. SO THAT'S MY INSIGHT ON THAT CATEGORY. SO THAT
19 ONE WE'RE NOT GOING TO GO FURTHER WITH.

20 IS THERE ANYTHING ELSE ON THE PLAINTIFFS' SIDE ON
21 THAT NOTE?

22 **MR. KENNERLY:** NO, THERE IS NOT, YOUR HONOR. THAT IS
23 IT FROM THE PLAINTIFF.

24 **THE COURT:** WELL, WE'RE PICKING ON MERCK, IT SOUNDS
25 LIKE, SO, MS. REYES, MAYBE I SHOULD TURN TO YOU FIRST.

1 **MS. REYES:** YES, YOUR HONOR. GOOD MORNING. THANK
2 YOU. I AM ACTUALLY GOING TO SPEAK ON BEHALF OF ALL DEFENDANTS
3 TODAY, UNLESS THEY HAVE OTHER THINGS TO ADD AFTER I'M FINISHED,
4 IF THAT'S OKAY WITH YOU.

5 **THE COURT:** OKAY. SURE.

6 **MS. REYES:** I'M GOING TO TAKE UP THE POINT THAT WAS
7 JUST ARTICULATED IN TURN. FIRST OF ALL, WITH RESPECT TO WHAT
8 PLAINTIFFS WANT DEFENDANTS TO DO, I THINK THE ISSUE HERE IS
9 THAT PLAINTIFFS ARE CONFUSING THREE DIFFERENT TYPES OF
10 DISCOVERY. THERE ARE DOCUMENT REQUESTS, THERE ARE
11 INTERROGATORIES, AND THERE ARE DEPOSITIONS. AND THERE ARE
12 DIFFERENT REQUIREMENTS FOR EACH TYPE OF DISCOVERY REQUEST.

13 WITH RESPECT TO THE DOCUMENT REQUESTS, THEY HAVE NOT
14 IDENTIFIED CATEGORIES OF DOCUMENTS THAT ARE MISSING. TO THE
15 EXTENT THAT THEY SAY THAT WE HAVE TO GO TO OUR EMPLOYEES AND
16 ASK THEM WHERE INFORMATION IS, THAT IS THE RESPONSE FOR
17 INTERROGATORY REQUESTS. SO THE QUESTION IS: DO THEY HAVE
18 APPROPRIATE INTERROGATORY REQUESTS TO THE DEFENDANTS THAT WOULD
19 REQUIRE DEFENDANTS TO GO DO THAT? AND THEY DO NOT.

20 THEY HAVE IDENTIFIED TWO DOCUMENT REQUESTS TO YOU --
21 TWO INTERROGATORIES TO YOU. NUMBER 25, WHICH THE DEFENDANTS
22 ANSWERED; AND NUMBER 26, WHICH IS BASICALLY ASKING FOR ALL ORAL
23 AND WRITTEN COMMUNICATIONS WITH RESPECT TO WHETHER THE DRUG
24 CAUSED PANCREATIC CANCER. THAT IS ONE INTERROGATORY. IT
25 COVERS YEARS' WORTH OF COMMUNICATIONS. IT COVERED POTENTIALLY

1 THOUSANDS OF COMMUNICATIONS, IF NOT MORE. WE WOULD HAVE TO ASK
2 HUNDREDS OF EMPLOYEES IN ORDER TO ANSWER THAT INTERROGATORY.
3 THAT IS THE TYPE OF INTERROGATORY THAT HAS REPEATEDLY BEEN HELD
4 TO BE INAPPROPRIATE AND NOT ENFORCED BY COURTS.

5 WITH RESPECT TO THE DOCUMENT REQUESTS, WE HAVE
6 PRODUCED TO THEM DOCUMENTS THAT ARE KEPT IN THE ORDINARY COURSE
7 OF BUSINESS. COURTS HAVE MADE CLEAR THAT IN THIS ERA OF
8 ELECTRONIC DISCOVERY, DOCUMENTS ARE PRODUCED AS THEY ARE KEPT
9 IN THE ORDINARY COURSE OF BUSINESS IF THEY ARE PRODUCED WITH
10 APPROPRIATE IDENTIFYING INFORMATION. WE HAVE DONE THAT.

11 THE DEFENDANTS HAVE FOLLOWED THE ESI PROTOCOL ENTERED
12 INTO BY JUDGE DEMBIN TO THE T. AND THERE IS NO ARGUMENT BY
13 PLAINTIFFS THAT WE HAVE NOT.

14 THEY HAVE INDICES OF OUR CUSTODIANS OF THE TO, FROM,
15 CC, FILE PATH, ETC. THOSE DOCUMENTS ARE FULLY SEARCHABLE BY
16 THE PLAINTIFFS. BECAUSE WE HAVE PRODUCED THEM IN THAT MANNER
17 AS THEY ARE KEPT IN THE ORDINARY COURSE OF BUSINESS, RULE 34
18 DOES NOT REQUIRE US TO DO WHAT PLAINTIFFS NOW DEMAND, THAT WE
19 IDENTIFY SPECIFIC DOCUMENTS WITH RESPECT TO SPECIFIC REQUESTS.

20 AND TO THE EXTENT THAT PLAINTIFFS WANT MORE
21 INFORMATION FROM EMPLOYEES, THEY ARE GOING TO GET DEPOSITIONS
22 OF THE EMPLOYEES AND THEY CAN ASK THE QUESTIONS DURING THOSE
23 DEPOSITIONS.

24 WITH RESPECT TO MISSING DOCUMENTS AND THE RISK/SAFETY
25 ANALYSIS OR IN THE COMMITTEE MEETINGS, WE HAVE PRODUCED TO THEM

1 THE MEETINGS FROM THE -- THE DOCUMENTS FROM OUR SHAREPOINT
2 SITE. THIS IS WHERE WE WERE TOLD THE DOCUMENTS WOULD BE
3 HOUSED. WE COLLECTED FROM THERE AND WE GAVE THEM TO
4 PLAINTIFFS. AND PLAINTIFFS DON'T HAVE TO SPECULATE THAT THAT
5 IS WHERE WE WENT; WE TOLD PLAINTIFFS PRECISELY THAT THAT'S
6 WHERE WE WENT.

7 BUT WE DID NOT ONLY DO THAT. WE ALSO PRODUCED FROM
8 CUSTODIANS, WHO ARE MEMBERS OF THOSE COMMITTEES, TO ALSO HAVE
9 THEIR CUSTODIAL FILES, WITH ANY OTHER DOCUMENTS THAT MIGHT BE
10 INVOLVED.

11 WITH RESPECT TO THE MINUTES, THE COMMITTEES WORKED BY
12 AGENDA AT MERCK. SO WHAT THEY DO HAVE ARE AGENDAS OF THOSE
13 COMMITTEES. AND I'M SURE PLAINTIFFS HAVE REVIEWED THOSE
14 AGENDAS.

15 WITH RESPECT TO THE POOLED SAFETY ANALYSIS, THIS IS
16 THE FIRST I'M HEARING ABOUT ANY ISSUE WITH THIS. AND I WILL
17 SAY THE FOLLOWING: THAT THIS IS A GOOD EXAMPLE OF THE FACT
18 THAT WHEN PLAINTIFFS RAISE SPECIFIC ISSUES, WE HAVE GONE BACK
19 AND WE HAVE TRIED TO BE VERY DILIGENT IN GOING BACK AND FINDING
20 FOR THEM THE CATEGORIES OF DOCUMENTS THAT THEY WANT.

21 WHAT I DO KNOW IS THAT THOSE POOLED ANALYSES WOULD BE
22 PART OF RAW DATA THAT WE ARE SEPARATELY MEETING AND CONFERRING
23 WITH. THE PLAINTIFFS HAVE NOT ASKED TO MEET AND CONFER ON
24 THOSE ISSUES UNTIL THE LAST COUPLE OF WEEKS. WE HAVE BEEN VERY
25 RESPONSIVE. WE HAVE MET AND CONFERRED WHEN THEY WANTED TO. WE

1 HAVE AGREED TO PRODUCE DATA TO THEM AND MAKE IT AVAILABLE FOR
2 INSPECTION, AND WE ARE WORKING THROUGH WITH OTHER PLAINTIFF
3 COUNSEL TO MAKE THAT HAPPEN.

4 AND THEN FINALLY, WITH RESPECT TO THE ISSUE WITH
5 RESPECT TO THE SPREADSHEET, AND THEY CLAIM NOW THAT WE HAVEN'T
6 IDENTIFIED FOR THEM WHICH STUDIES RELATE TO PANCREATIC CANCER.
7 THE FIRST I RECEIVED THAT REQUEST WAS TWO WEEKS AGO, ON A MEET
8 AND CONFER WITH RESPECT TO THE RAW DATA. IT WAS A MEET AND
9 CONFER I HAD WITH DIFFERENT PLAINTIFF COUNSEL. THEY ASKED FOR
10 THAT. WE'LL AGREE TO PROVIDE THAT FOR THEM. WE'LL AGREE TO
11 PROVIDE FOR THEM STUDIES IN WHICH THERE WERE ADVERSE EVENT
12 REPORTS OF PANCREATIC CANCER EVENTS.

13 WE DON'T THINK THAT THAT IS A PROPER STATISTICAL
14 ANALYSIS TO DO BECAUSE YOU HAVE TO DO THE STATISTICAL ANALYSIS
15 ACROSS ALL STUDIES, NOT JUST THOSE IN WHICH PANCREATIC CANCER
16 EVENTS OCCURRED. BUT I DO THINK THIS IS ANOTHER INSTANCE IN
17 WHICH WHEN THE PLAINTIFFS ASK US FOR SPECIFIC TYPES OF
18 DOCUMENTS, WE TRY TO BE RESPONSIVE. AND THERE ARE A NUMBER OF
19 ISSUES THAT HAVE BEEN RAISED FOR THE FIRST TIME ON THIS CALL
20 THAT ARE PART OF SEPARATE MEET AND CONFERS THAT ARE ONGOING AT
21 THIS TIME.

22 SO I THINK WITH RESPECT TO WHAT THE DECISION IS FOR
23 THE COURT, SO FAR AS I UNDERSTAND IT, IS, ONE, ARE DEFENDANTS
24 OBLIGATED, IN RESPECT TO THEIR DOCUMENT REQUESTS, TO IDENTIFY
25 WHICH DOCUMENT GOES WITH WHICH REQUEST? AND THE ANSWER IS NO,

1 BECAUSE RULE 34 PERMITS DEFENDANTS TO PRODUCE THE DOCUMENTS IF
2 THEY ARE KEPT IN THE ORDINARY COURSE OF BUSINESS.

3 WITH RESPECT TO THE TWO INTERROGATORIES AT ISSUE, 25
4 AND 26, THEY HAVE NOT IDENTIFIED ANY ISSUES WITH 25 IN THEIR
5 MOTION PROFFER, AND ON THAT BASIS IT SHOULD BE DENIED.

6 WITH RESPECT TO 26, THAT IT'S JUST TOO BROAD, ASKING
7 FOR ALL WRITTEN AND ORAL COMMUNICATIONS.

8 **THE COURT:** WHY WEREN'T THE SPREADSHEETS PART OF THE
9 INITIAL PRODUCTION WITH REGARD TO THE INFORMATION RELATED TO
10 CAUSE? I UNDERSTAND YOU'RE NOW GOING TO PRODUCE THEM, BUT WHY
11 WEREN'T THEY THERE IN THE FIRST INSTANCE?

12 **MS. REYES:** WE PRODUCED THE SPREADSHEETS IN THE FIRST
13 INSTANCE, YOUR HONOR. WE CREATED THE SPREADSHEETS FOR THE
14 PLAINTIFFS AS PART OF THE INITIAL INTERROGATORY RESPONSES.
15 THEY'VE HAD THOSE SPREADSHEETS FOR MONTHS. THEY'VE NEVER
16 IDENTIFIED UNTIL THE LAST TWO WEEKS THAT THEY WANTED MORE
17 SPECIFIC INFORMATION THAN WHAT WAS PROVIDED. AND AS SOON AS
18 THEY IDENTIFIED IT FOR US, WE AGREED TO TRY TO GO BACK AND DO
19 THAT.

20 **THE COURT:** SO NOW YOU WILL BE PRODUCING THE RAW DATA
21 UNDER THE SPREADSHEETS, RIGHT? I'M SORRY. I DIDN'T MEAN TO
22 CUT YOU OFF.

23 **MS. REYES:** THERE IS AN IMMENSE AMOUNT OF RAW DATA.
24 WHAT WE'RE TRYING TO WORK THROUGH WITH PLAINTIFF IS DO THEY
25 WANT THE RAW DATA FOR EVERY STUDY, IN WHICH CASE THAT WOULD BE

1 AN IMMENSE AMOUNT AND THEY WOULD HAVE TO INSPECT IT AT THE
2 DEFENDANTS' HEADQUARTERS. OR ARE THERE SPECIFIC STUDIES FOR
3 WHICH THEY WANT RAW DATA, IN WHICH CASE WE'LL PRODUCE THAT
4 SPECIFIC RAW DATA. BUT WE HAVE HAD THAT OFFER ON THE TABLE
5 SINCE MAY, YOUR HONOR.

6 **THE COURT:** OKAY. THAT MAY BE, BUT THE QUESTION YOU
7 HAVE ANSWERED IS THAT YOU'RE WORKING WITH PLAINTIFFS ON THAT.

8 AND I DON'T KNOW THAT WE HAVE COVERED SPECIFICALLY
9 THE STATISTICAL ANALYSIS REPORTS, THEIR APPARENT LACK OF
10 EXISTENCE, FROM THE PLAINTIFFS' VIEW OF THE DATA. ARE THEY IN
11 THIS SHAREPOINT MATERIAL THAT HAS BEEN PROVIDED, THE
12 STATISTICAL ANALYSIS REPORTS THAT WOULD HAVE BEEN THE
13 UNDERLYING -- OR I GUESS THE WORK PRODUCT OF THE POOLED SAFETY
14 ANALYSIS?

15 **MS. REYES:** YOUR HONOR, THIS IS THE FIRST TIME
16 HEARING ABOUT IT. BUT I CAN SAY THE FOLLOWING: THEY WILL NOT
17 BE IN THE SHAREPOINT SITE. I UNDERSTAND THAT THEY WILL BE IN
18 THE RAW DATA ANALYSIS. AND CERTAINLY, TO THE EXTENT THAT THEY
19 THINK THEY ARE MISSING INFORMATION, I WILL TRY TO TRACK THAT
20 DOWN FOR THEM.

21 **THE COURT:** OKAY. ALL RIGHT. AND THEN FORGIVE ME
22 BUT THERE WAS A POINT THREE ABOUT YOUR PAGE FOUR RESPONSE AND
23 LOU ANN EADER. AND THAT IS PART OF THIS RAW DATA UNDER THE
24 SPREADSHEET DISCUSSION, AS WELL, AS FAR AS YOU UNDERSTAND IT,
25 MS. REYES?

1 **MS. REYES:** WELL, I'M NOT SURE WHAT THE CONCERN IS.
2 BASICALLY, THEY ARE SAYING THERE IS AN INTERROGATORY AND MERCK
3 RESPONDED TO IT. AND THAT'S WHAT WE DID. AND THIS IDEA THAT
4 THEY DIDN'T HAVE THIS UNTIL JUNE I DON'T THINK IS CORRECT. WE
5 PRODUCED DOCUMENTS AS THE COURT ORDERED THEM. WE PRODUCED
6 INTERROGATORY RESPONSES IN MAY. WE MET AND CONFERRED WITH
7 PLAINTIFF ON SOME OF THEM. WE REVISED SOME OF THEM. AND THEN
8 WE PRODUCED DOCUMENTS THAT WE WERE ORDERED TO, MEETING ALL THE
9 DEADLINES.

10 **THE COURT:** OKAY. AND MY ASSUMPTION IS THAT UNDER
11 RULE 26(G), ALL OF THE INTERROGATORY RESPONSES OR DOCUMENT
12 REQUESTS WERE VERIFIED OR SIGNED OFF ON BY COUNSEL OR THE PARTY
13 AS TO THE REASONABLE INQUIRY AND THE COMPLETENESS. IS THAT
14 TRUE AS FAR AS MERCK IS CONCERNED?

15 **MS. REYES:** YES. CERTAINLY, YOUR HONOR.

16 **THE COURT:** AND LILLY, AS WELL?

17 **MR. KING:** YES, YOUR HONOR.

18 **THE COURT:** AND NOVO NORDISK, TRUE FOR THEM?

19 **MS. LEVINE:** NOVO NORDISK. YES, YOUR HONOR.

20 **THE COURT:** AND AMYLIN?

21 **MS. LAURENDEAU:** YES, YOUR HONOR.

22 **THE COURT:** OKAY. ALL RIGHT. ANY OF THE OTHER
23 DEFENSE COUNSEL WANT TO SAY ANYTHING TO SUPPLEMENT WHAT
24 MS. REYES HAS ADVISED?

25 IF NOT, PLAINTIFF, ANY FINAL WORD? MR. KENNERLY, OR

1 OTHERS ON THIS?

2 **MR. KENNERLY:** YES, YOUR HONOR.

3 **THE COURT:** GO AHEAD.

4 **MR. KENNERLY:** THIS IS MR. KENNERLY, AGAIN. JUST A
5 FEW POINTS TO COVER. ONE OF THEM IS ABOUT SPREADSHEETS. THERE
6 IS MULTIPLE SPREADSHEETS TO TALK ABOUT HERE. THE ONE THAT
7 DEFENSE COUNSEL IS REFERENCING, THAT THEY GAVE US SOME TIME
8 AGO, IS THE SPREADSHEET OF STUDIES CONDUCTED ON THE DRUGS. AND
9 THAT'S THE ONE WHERE WE ARE CONTINUING TO MEET AND CONFER, THE
10 RAW DATA WE WANT FROM WHICH STUDIES.

11 NOW, WE HAVE REQUESTED ALL. THEY SAID NO. WE HAD A
12 MEET AND CONFER BACK AND FORTH. WE'VE HAD OUR EXPERTS LOOKING
13 AT WHICH ONES THEY WANT. SO THAT IS STILL PART OF THE MEET AND
14 CONFER.

15 BUT THERE ARE DIFFERENT SPREADSHEETS THAT HAVE BEEN
16 DISCUSSED HERE. AND THIS ISN'T THE MOTION FOR IT, BUT I DON'T
17 WANT TO HAVE THE COURT HAVE A MISUNDERSTANDING OF IT. SOME OF
18 WHAT WE REQUESTED IS IDENTIFIABLE PANCREATIC CANCER CASES IN
19 YOUR CLINICAL TRIALS. THE DEFENDANTS HAVE ALL SAID THEY WILL
20 ABSOLUTELY NOT DO THAT.

21 WE HAVE FOUND, THROUGH SOME FISHING THROUGH THESE
22 DOCUMENTS, SOME BARING OF THIS. THEY ARE NEVER IN THE ORIGINAL
23 NATIVE FORMAT THEY WERE STORED IN. THEY USUALLY HAVE SCANS OF
24 IT. BUT WE DON'T HAVE THAT AT ALL. AND THE DEFENDANTS HAVE
25 OBJECTED TO GIVING US ANYTHING LIKE THAT. THEY HAVE OBJECTED

1 TO GIVING US ANY SPREADSHEET ABOUT ADVERSE EVENTS, EITHER.
2 THAT IS THE SUBJECT OF OUR MOTION. SO I DON'T WANT THE COURT
3 TO MISUNDERSTAND WHICH SPREADSHEETS ARE DISCUSSED. THERE ARE
4 MULTIPLE ONES OUT THERE BEING DISCUSSED BACK AND FORTH.

5 **THE COURT:** RIGHT. I WAS FOCUSING -- AND I
6 APPRECIATE YOUR COMMENTS. WE'RE FOCUSING ON THE ONES THAT ARE
7 RESPONSIVE TO THE INTERROGATORIES OR DOCUMENT REQUESTS THAT ARE
8 THE SUBJECT OF THE MOTION. THERE MAY WELL BE OTHERS, AND I
9 ACKNOWLEDGE THAT.

10 ANYTHING ELSE, THEN?

11 **MR. KENNERLY:** YES, VERY BRIEFLY. THE POOLED
12 ANALYSIS EVALUATIONS -- AND I'M A LITTLE LOST ON HOW AN
13 EVALUATION OF STATISTICAL DATA COULD BE RAW DATA, BUT THIS IS A
14 BIGGER GLOBAL POINT HERE. WHICH IS, YOU KNOW, THESE ARE THINGS
15 THAT WHEN WE DIVED THROUGH, BACK AND FORTH, WE WERE ABLE TO
16 LOCATE AND THEN HAD AN ISSUE WITH IT. WHEREAS IF YOU PRESENTED
17 THESE QUESTIONS -- HAVEN'T YOU BEEN ANALYZING A CAUSAL LINK --
18 YOUR SCIENTIST AT MERCK WILL COME BACK AND SAY, WELL, HERE IS
19 THE POOLED SAFETY ANALYSIS, HERE IS THE EVALUATION OF THE
20 STATISTICAL DATA. AND THE RESPONSE THE DEFENDANTS GAVE IS
21 REALLY THE SUM TOTAL OF THIS MOTION.

22 THE RESPONSE THAT THE DEFENDANTS GAVE IS WELL, WE DID
23 ESI SEARCHES ON CUSTODIANS, AND WE PULLED SOME STUFF FROM
24 SHAREPOINT. AND PLAINTIFFS' POSITION IS THAT'S OKAY FOR ESI.
25 IT'S NOT OKAY FOR INTERROGATORIES AND REQUESTS FOR DOCUMENTS.

1 INTERROGATORIES AND REQUESTS FOR DOCUMENTS REQUIRE YOU GO AND
2 SPEAK WITH THE AGENT, YOU LOOK AT THE AGENT'S KNOWLEDGE. THAT
3 IS THE REASONABLE INVESTIGATION. THE IDEA THAT THIS IS
4 HUNDREDS OF EMPLOYEES WHO WOULD BE ASSESSING THE CAUSAL LINK
5 BETWEEN JANUVIA AND PANCREATIC CANCER -- IT'S NOT. IT'S GOING
6 TO BE, AT MOST, A DOZEN, MAYBE 20 OF THEM. SIMPLY ASK THEM:
7 WHAT CRITERIA DO YOU USE, WHAT DOCUMENTS DO HAVE REFLECTING IT?

8 AND AGAIN, WE DON'T HAVE ANY OF THAT. OR IF WE DO
9 HAVE IT, WE HAVE IT BURIED SOMEWHERE. WHEREAS IF I WALKED INTO
10 MERCK'S OFFICE AND SAID HOW HAVE YOU BEEN ANALYZING THE
11 EPIDEMIOLOGY, SOMEONE COULD TAKE ME RIGHT TO THESE DOCUMENTS.
12 THEY COULD TAKE ME RIGHT TO THESE AGENDA NOTES OR MINUTES. WE
13 CAN'T FIND EITHER OF THOSE. THEY COULD TAKE ME RIGHT TO THE
14 STATISTICAL ANALYSES. AND THAT WOULD BE THAT.

15 SO THAT IS WHAT WE'RE ASKING. AND THIS IS WHY WE'RE
16 HOPING TO GET DIRECTION FOR THE FUTURE. THE DEFENDANTS'
17 POSITION IS THE CUSTODIAL SEARCH IS GOOD ENOUGH. RUN THE ESI
18 PROTOCOL AND YOU'RE DONE. OUR VIEW IS YOU STILL NEED TO GO
19 TALK TO THE EMPLOYEES, RELATE BACK WHAT THEY SAID, IDENTIFY THE
20 DOCUMENTS THEY IDENTIFIED AS RESPONSES.

21 **THE COURT:** SO IT SOUNDS LIKE WHAT YOU'RE SAYING IS
22 YOU WANT DETAILS AS TO WHAT THEY DID IN ORDER TO RESPOND TO THE
23 INTERROGATORIES -- WHO THEY SPOKE TO AND SO FORTH, WHAT FILES
24 THEY SEARCHED OR DIDN'T SEARCH?

25 **MR. KENNERLY:** THAT WOULD BE PART OF IT. IF THEY'RE

1 RESPONDING TO REQUESTS FOR DOCUMENTS WITH SOME DOCUMENTS, WELL,
2 WHERE DID THESE COME FROM? IS IT THE ESI SEARCH, IS IT THE
3 SHAREPOINT? BUT AN ADDITIONAL ISSUE IS DID SOMEONE IDENTIFY
4 THIS AS RELEVANT? WHO DID YOU TALK TO?

5 AND THE ANSWERS THAT WE GOT BACK DON'T INDICATE
6 ANYONE WAS TALKED TO. THEY OBJECT: LOOK, WE'VE GIVEN YOU THE
7 ESI SEARCHES AND THE CUSTODIAN FILES AND THAT'S IT. FULL STOP.

8 SO THE FIRST TIME WE'RE GONNA KNOW WHAT, FOR EXAMPLE,
9 LOU ANN EADER -- WHAT COMMUNICATIONS SHE KNOWS OF, THIS IS
10 GOING TO BE DURING HER DEPOSITION. AND AS TO THE
11 EPIDEMIOLOGIST AT MERCK, THE FIRST TIME WE'RE GOING TO ASK THEM
12 WHAT ANALYSES HAVE YOU PERFORMED, THE FIRST TIME WE'LL HAVE AN
13 ANSWER IS WHEN IT'S DURING THEIR DEPOSITION. AND THIS IS
14 READILY AVAILABLE TO THE COMPANY, JUST TO ASK THEIR EMPLOYEES
15 WHAT HAVE YOU DONE, AND THEY CAN POINT TO IT.

16 **THE COURT:** AND I UNDERSTAND THAT. BUT I THINK
17 INTERROGATORY 26 IS WAY OVERBROAD IN ITS APPROACH TO THE ANY
18 AND ALL, CONTRARY TO SOME OF THE DOCUMENT REQUESTS THAT DO GET
19 MORE SPECIFIC TO CAUSALLY-RELATED DOCUMENTS AND SO FORTH.

20 BUT YOU ARE ASKING FOR A WIDE UNIVERSE THAT COULD --
21 I THINK SOMEBODY DESCRIBED -- INCLUDE POST-ITS AND OTHER
22 THINGS. AND THE FOCUS OF THE DISCOVERY AT THIS STAGE OF THE
23 CASE -- TO GO BACK IN TIME TO SOME OF OUR EARLIER
24 CONVERSATIONS -- WAS TO LOOK AT THE SCIENTIFIC DATA. AND THIS
25 ANECDOTAL NOTE OR COMMUNICATION IS WAY BEYOND THE SCOPE THAT

1 THE COURT HAS NARROWLY CRAFTED TO DATE.

2 SO I DO FIND INTERROGATORY 26 OVERBROAD, DESPITE THAT
3 THERE IS RESPONSES FROM A VARIETY OF THE DEFENDANTS, CITING TO
4 BATES DOCUMENTS, CUSTODIAL FILES, AND SO FORTH. AND TO SOME
5 DEGREE THE PLAINTIFFS DO HAVE TO GO THROUGH AND ANALYZE THE
6 DATA, AS THEY WOULD IN ANY EVENT.

7 THE KEY HERE, I BELIEVE, IS THAT WHAT YOU'RE ASKING
8 FOR, IN LARGE PART, IS THE WORK PRODUCT OR THE
9 BEHIND-THE-SCENES EFFORTS OF COUNSEL. THEY HAVE CERTIFIED
10 THEY'VE MADE REASONABLE INQUIRY. THAT IS WHAT RULE 26(G)
11 REQUIRES, AND THEY APPEAR TO HAVE MET THAT.

12 SHOULD THE LATER DEVELOPMENTS IN THE CASE SHOW THAT
13 THEY WERE NOT IN EARNEST IN THOSE CERTIFICATIONS OF THE
14 PRODUCTION, THEN THAT WOULD BE A CAUSE TO LOOK AT THE
15 ASSESSMENT OF SANCTIONS, COST-SHIFTING OR SOMETHING, FOR A
16 FAILURE TO HAVE APPROPRIATELY DONE SO.

17 BUT THE COURTS NEVER REQUIRE A DUE DILIGENCE
18 COMPONENT TO THE RESPONSE. WE TAKE COUNSEL AT THEIR WORD THAT
19 THE PROCESS HAS BEEN COMPLETE AND REASONABLE. AND WHERE
20 EVIDENCE TO THE CONTRARY SURFACES, THEN WE'LL GET INTO THAT
21 INQUIRY.

22 I DISAGREE WITH THE PLAINTIFFS' ANALYSIS THAT THE
23 DEFENDANTS' RESPONSES TO INTERROGATORIES -- OR RESPONSES TO
24 REQUESTS FOR PRODUCTION VIOLATE THE SPIRT OR THE LETTER OF RULE
25 34. INDEED, THESE DOCUMENTS PURPORT TO HAVE BEEN PRODUCED AS

1 THEY ARE KEPT IN THE NORMAL COURSE OF BUSINESS, AND THAT IS
2 ALTERNATIVE NUMBER TWO. IF YOU READ RULE 34, AS I'M SURE YOU
3 ALL HAVE, THEY DON'T NEED TO IDENTIFY.

4 BUT AS I LOOK THROUGH THE VARIOUS RESPONSES FROM THE
5 EXHIBITS THAT WERE PRODUCED BY THE PLAINTIFFS, THERE IS A LOT
6 OF REFERENCE TO EITHER PARTICULAR CUSTODIANS OR PARTICULAR
7 BATES-STAMPED DOCUMENTS. AND THE TYPE OF SPECIFICITY REQUIRED
8 TO MEET THE SPIRIT, AS WELL AS THE LETTER OF THE LAW, EXISTS.

9 NOW, YOU'VE GOT ISSUES WITH REGARD TO EITHER
10 SOMETHING THAT CAN'T BE LOCATED, SOMETHING DISCRETE -- FOR
11 INSTANCE, THIS DISCUSSION ABOUT THE MINUTES OF THE TEAM WHICH
12 WE NOW LEARN ARE REALLY AGENDAS. IF YOU CAN'T FIND THE
13 AGENDAS, CALL COUNSEL. THEY CERTAINLY WOULD BE PROFESSIONAL
14 ENOUGH TO SAY WHERE THEY ARE OR DOUBLECHECK TO MAKE SURE YOU
15 HAVE GOT THEM.

16 A LOT OF THIS STATISTICAL ANALYSIS DEBATE AND THE
17 SPREADSHEET ISSUE SEEMS TO BE SOMETHING STILL IN PLAY AS IT
18 GOES NOT TO THE STATISTICAL ANALYSIS OF THE SPREADSHEET SO MUCH
19 AS THE RAW DATA THAT UNDERLIES IT. WHICH, I THINK, WOULD
20 BENEFIT FROM SOME PROPORTIONALITY ANALYSIS BETWEEN THE SIDES,
21 PERHAPS EVEN AN APPROACH BY WAY OF SAMPLING, TO THE EXTENT THAT
22 THERE IS A HUGE MOUNTAIN OF DATA, WHICH COST AND TIME MAY NOT
23 YIELD A GREAT DEAL OF BENEFIT. SO I URGE YOU TO CONSIDER MAYBE
24 SAMPLING OR SOME LIMITED INITIAL PRODUCTION IN THE INTEREST OF
25 SEEING IF IT'S WORTH DOING THE WHOLE NINE YARDS HERE.

1 BUT ON ITS FACE I'M GOING TO DENY THE MOTION TO
2 COMPEL, FINDING INTERROGATORY 26 OVERBROAD, FINDING THERE BEING
3 APPROPRIATE COMPLIANCE UNDER RULE 33 IN RESPONDING TO
4 INTERROGATORY 25, FINDING COMPLIANCE BY PRODUCING THE DOCUMENTS
5 AND CERTIFYING THEM AS COMPLETE. EVEN THOUGH THEY REFER TO
6 OTHER DATA, THAT IS FULLY CONTEMPLATED NOT ONLY IN THE
7 ELECTRONIC AGE -- AND I'M ONLY LOOKING AT THE RULES. THE ESI
8 PROTOCOL IS CERTAINLY APPROPRIATE AS IT GOES TO FORMAT AND
9 OTHER PARTICULARS OF THE ESI CONSTRUCT. BUT IN TERMS OF
10 MEETING THE LETTER OF RULE 34, I FIND THE DEFENDANTS HAVE.

11 SO THE MOTION TO COMPEL IS DENIED. AND WE'LL
12 CERTAINLY UNDERTAKE TO DISCUSS THE RAW DATA ISSUE AFTER YOU
13 HAVE COMPLETED THE PROCESS ON THAT, AND THESE OTHER ISSUES
14 WHICH ARE PENDING IN OTHER MATTERS.

15 SO I'M DENYING THE MOTIONS. AND TURN YOU BACK TO
16 YOUR OWN DEVICES TO CONTINUE TO MEET AND CONFER, WITH THE IDEA
17 THAT WE'LL BE TALKING ON STATUS, I THINK, NEXT WEEK; AND THE
18 WEEK AFTER, WE HAVE ANOTHER ONE OF THESE ON SOME MORE DISCRETE
19 ISSUES OF THE DATA THAT IS THE CENTER OF THE CASE.

20 SO THAT IS HOW I'LL LEAVE IT WITH YOU FOR TODAY. AND
21 I HAVE TO RUN TO ANOTHER HEARING, SO I'M GOING TO TURN YOU
22 LOOSE AND WE'LL TALK TO YOU NEXT WEEK. SO THANKS VERY MUCH.

23
24
25

1 MS. REYES: THANK YOU, YOUR HONOR.

2 MR. KENNERLY: THANK YOU, YOUR HONOR.

3 (PROCEEDINGS CONCLUDED AT 10:58 A.M.)

4 CERTIFICATION

5 I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
6 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
7 STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
8 TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE
ON SEPTEMBER 10, 2014; THAT SAID TRANSCRIPT IS A TRUE AND
CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE
FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF
THE UNITED STATES JUDICIAL CONFERENCE.

9

10 DATED: SEPTEMBER 11, 2014, AT SAN DIEGO, CALIFORNIA.

11 S/N _____
12 JEANNETTE N. HILL, OFFICIAL REPORTER, CSR NO. 11148